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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 499.

GREAT NORTHERN RAILWAY COMPANY,
Petitioner,

vs.

P. B. SULLIVAN, DOING BUSINESS AS ALBERTA COAL SALES COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN ANSWER TO PETITION FOR WRIT OF CERTIORARI.

ORMIE C. LANCE,
STANLEY B. HOUCK,
Attorneys for Respondent.

Hayward Brief Co., 601-7 Fourth Ave. So., Minneapolis

SUBJECT INDEX.

	Page
Statement	1
Points and authorities	1
Argument	3
I. The express provisions of the Interstate Commerce Act required petitioner to publish and charge a just and reasonable rate for the transportation of respondent's freight from the international boundary to the United States destinations thereof	3
II. Petitioner has published and collected a charge which the Interstate Commerce Commission has found was, when exacted, unjust and unreasonable	6
III. Petitioner's unjust and unreasonable charge for transporting respondent's shipments was a violation of the act which damaged respondent	7
IV. The amount of respondent's damage is measured by the difference between the unreasonable charge exacted and the charge found reasonable by the Commission	8
V. General answer to petitioner's argument	9
VI. Conclusion	14

TABLE OF CASES CITED.

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184 8

Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al., 142 I. C. C. 543 ..... 6, 7, 9

Lewis-Simas-Jones Co. vs. Southern Pacific Co., 283 U. S. 654, 75 L. Ed. 1333 ..... 5, 8, 10, 11, 12, 13

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73 ..... 8, 9

Meeker vs. Lehigh Valley R. Co., 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328 8

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225 ..... 5, 7, 10, 11, 12, 13

New York, N. H. & H. R. Co. vs. Ballow & Wright (C. C. A., 9th Circuit), 242 Fed. 862, 155 C. C. A. 450 9

TABLE OF STATUTES CITED.

Interstate Commerce Act, Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, U. S. Code Annotated, title 49, Section 1, (5) 3, 7, 12

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STATEMENT.

Petitioner's statement (petition for writ of certiorari, pp. 1-5) is substantially a full and correct one.

RESPONDENT'S POINTS AND AUTHORITIES.

The express provisions of the Interstate Commerce Act required petitioner to publish and charge a just and reasonable rate for the transportation of respondent's freight from the international boundary to the destinations thereof in the United States.

Interstate Commerce Act, Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, U. S. Code Annotated,

title 49, section 1 (1), (2), (5); section 6, (1), (7); section 8, section 13, (1).

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225.

Lewis-Simas-Jones Co. vs. Southern Pacific Co., 283 U. S. 654, 75 L. Ed. 1333.

Conformable to the provisions of the Act, petitioner published and collected a charge which the Interstate Commerce Commission has found was, as applied to respondent's shipments, unjust and unreasonable.

Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al., 142 I. C. C. 543.

The charging by petitioner of an unjust and unreasonable rate for the transportation of respondent's freight was a violation of the Interstate Commerce Act which damaged respondent, within the meaning of the provisions of the Act, and entitled respondent to a judgment against petitioner for the amount of that damage.

Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al., 142 I. C. C. 543.

Meeker vs. Lehigh Valley R. Co., 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328.

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

Lewis-Simas-Jones Co. vs. Southern P. Co., 283 U. S. 654, 75 L. Ed. 1333.

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225.

Adams v. Mills, 286 U. S. 397, 76 L. Ed. 1184.

Interstate Commerce Act, Act of February 4, 1887, c. 104, 24 Stat. 379, as amended, U. S. Code Annotated, title 49, section 1, (5).

The amount of respondent's damage is measured by the difference between the unjust and unreasonable charge exacted and the charge found just and reasonable by the Interstate Commerce Commission, with interest upon the total amount of such difference.

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

New York, N. H. & H. R. Co. vs. Ballow & Wright (C. C. A., 9th Circuit), 242 Fed. 862, 155 C. C. A. 450.

Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al., 142 I. C. C. 543.

ARGUMENT.

I.

THE EXPRESS PROVISIONS OF THE INTERSTATE COMMERCE ACT REQUIRED PETITIONER TO PUBLISH AND CHARGE A JUST AND REASONABLE RATE FOR THE TRANSPORTATION OF RESPONDENT'S FREIGHT FROM THE INTERNATIONAL BOUNDARY TO THE UNITED STATES DESTINATIONS THEREOF.

The Interstate Commerce Act, section 1, subdivisions (1), (2) and (5); section 6, subdivision (1); section 8 and section 13, subdivision (1), provide:

"Section 1. (1) That the provisions of this Act shall apply to common carriers engaged in

(a) The transportation of * * * property wholly by railroad * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation * * * takes place within the United States.*

(2) The provisions of this Act shall also apply to such transportation of * * * property * * * *but only*

*in so far as such transportation * * * takes place within the United States.*

(5) All charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 6. (1) That every common carrier *subject to the provisions of this Act* shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates * * * and charges for transportation between different points on its own route. * * *

(7) No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

Section 8. That in case any common carrier subject to the provisions of this Act shall do, cause to be done,

or permit to be done any act, matter or thing in this Act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act. * * *

Section 13. (1) That any person, firm, corporation * * * complaining of anything done or omitted to be done by any common carrier *subject to the provisions of this Act*, in contravention of the provisions thereof, may apply to said Commission. * * *"

Respondent's position is fully sustained by:

News Syndicate Co. vs. N. Y. C. R. Co., 275 U. S. 179, 72 L. Ed. 225.

Lewis-Simas-Jones Co. vs. Southern Pacific Co., 283 U. S. 654, 75 L. Ed. 1333.

In *News Syndicate Co., supra*, the Court said:

"The Interstate Commerce Act applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. * * * It was the duty of defendants in error to establish just and reasonable rates for that service. * * * *The failure to establish rates covering the transportation from the international boundary contravened the provisions of the Act.* * * *"

In *Lewis-Simas-Jones Co., supra*, the Court said:

"While the Act does not govern the joint through international rate, the demand for reparation is grounded on the claim that the maintenance of that rate participated in by the American carrier and *its violation of*

> *the Act, in failing to maintain a just and reasonable rate for the transportation from the boundary to destination*, operated to compel payment of the charges based on the excessive joint rate."

It was, therefore, petitioner's duty to publish and apply a just and reasonable rate for the transportation of respondent's freight from the international boundary to the destinations of the freight in the United States.

II.

Petitioner Has Published and Collected a Charge Which the Interstate Commerce Commission Has Found Was When Exacted Unjust and Unreasonable.

In *Alberta Coal Sales Company, et al., vs. Canadian National Railways, et al., supra*, the Interstate Commerce Commission found (R., pp. 32, 33):

> "Upon all the facts of record we find that, as applied to the Canadian coal to which this proceeding relates and for both single-line and joint-line hauls, the rates assailed were, are, and for the future will be unjust and unreasonable to the extent that they have exceeded or may exceed the rates per ton of 2,000 pounds set forth in the sub-joined table for the respective distances shown and which we find to be the maximum reasonable rates for application to the transportation of the traffic in question."

Petitioner, as required by the Act, published a charge, applicable to the transportation of respondent's shipments, from the international boundary to the destinations thereof in the United States. This charge the Interstate Commerce Commission found to be unjust and unreasonable and, there-

fore, in violation of the provisions of Section 1 of the Act.

No attack is made by petitioner upon the propriety of this finding by the Commission. It does not question the unreasonableness of the rate from the boundary to United States destinations. Its attack is solely that the Commission did not find unreasonable the entire through charge.

III.

Petitioner's Unjust and Unreasonable Charge for Transporting Respondent's Shipments Was a Violation of the Act Which Damaged Respondent.

In *Alberta Coal Sales Company, et al., vs. Canadian National Railways, et al., supra*, the Interstate Commerce Commission found (R., p. 34):

> "We further find that complainants and the Monarch Elevator Company, intervener, made shipments under the rates herein found unreasonable and paid or bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued or would accrue at the rates herein found reasonable, and that they are respectively entitled to reparation in those amounts, with interest."

In section 1, subdivision (5) of the Interstate Commerce Act, it is required that

> "(5) All charges made for any service rendered * * * in the transportation of * * * property * * * shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

In the *News Syndicate Co. case, supra*, and the *Lewis-*

Simas-Jones Co. case, supra, the Court held that it was the duty of defendants in error to establish just and reasonable rates for the transportation from the international boundary to destinations in the United States.

Throughout the history of common carrier law, long before the enactment of the Interstate Commerce Act, and ever since, it has never been questioned that the payer of an unjust and unreasonable rate is damaged to the extent the charge collected exceeds a just and reasonable rate.

Petitioner surely does not assert the contrary.

Meeker vs. Lehigh Valley R. Co., 236 U. S. 412, 59 L. Ed. 644, 35 S. Ct. 328.

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

Lewis-Simas-Jones Co. vs. Southern P. Co., 283 U. S. 654, 75 L. Ed. 1333.

"If the defendants exacted from them an unlawful charge, the exaction was a tort, for which the defendants were entitled, as for other torts, to compensation from the wrongdoer."

Adams vs. Mills, 286 U. S. 397, 76 L. Ed. 1184.

IV.

The Amount of Respondent's Damage Is Measured by the Difference Between the Unreasonable Charge Exacted and the Charge Found Reasonable by the Commission.

When a carrier has exacted an unreasonable rate, the payer is damaged in the amount the exaction exceeds the reasonable rate with interest.

"The carrier concedes, as it must under *Southern P. Co. vs. Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 62 L.

Ed. 451, P. U. R. 1918 B, 598, 38 Sup. Ct. Rep. 186, that a recovery for excessive freight charges can be had under section 1 without specific proof of pecuniary loss, and that the measure of damages is the amount of the excess exacted."

Louisville & N. R. Co. vs. Shloss-Sheffield S. & I. Co., 269 U. S. 217, 70 L. Ed. 242, 46 S. Ct. 73.

New York, N. H. & H. R. Co. vs. Ballow & Wright (C. C. A. 9th Circuit), 242 Fed. 862, 155 C. C. A. 450.

In *Alberta Coal Sales Co., et al., vs. Canadian National Railways, et al.*, 142 I. C. C. 543, the Commission said (R., p. 34):

"We further find that complainants * * * made shipments under the rates herein found unreasonable and paid and bore the charges thereon; that they were damaged thereby in the respective differences between the charges paid and those that would have accrued * * * at the rates herein found reasonable, and that they are respectively entitled to reparation in those amounts, with interest."

V.

General Answer to Petitioner's Argument.

The Interstate Commerce Act treats a domestic through rate composed of separate factors quite differently from an international through rate similarly composed. With respect to the international rate, the provisions of the act are specific. The carrier must publish separately a rate for so much of the transportation as takes place within the United States. No such provision is made for the separate factors of a through rate where the transportation is entirely within the United States.

There is, obviously, a practical consideration affecting the international rate which does not affect an exclusively domestic rate. Carriers within the United States are subject to the Interstate Commerce Act and the Interstate Commerce Commission. Carriers in Canada are subject to the provisions of a different transportation act and the jurisdiction of a similar commission.

If the rate is a joint through rate, published as were the rates in *News Syndicate*, *supra*, and *Lewis-Simas-Jones Company*, *supra*, one Commission might find the joint through rate a reasonable one; the other might find it unreasonable. The same might be true if the two proportional factors of the rate were submitted to the consideration of the two commissions. The two commissions might agree. They might disagree.

Obviously, the only satisfactory method of procedure is that prescribed by the Interstate Commerce Act, namely, the publication by carriers performing transportation within the United States of a just and reasonable rate for that service. Such a rate can then be considered by the Interstate Commerce Commission and its finding accepted as binding upon everyone, whether in the United States or in Canada. Similarly, the Canadian proportion of the rate can be considered by the Canadian tribunal and its conclusion accepted by all. Unless international rates are so published and considered, confusion and uncertainty will inevitably result.

The entirely different situation in respect of the international and the domestic rate makes irrelevant petitioner's reference to the treatment of domestic joint through rates by the Interstate Commerce Commission or by the courts. There is no requirement in the Act that a proportional rate, or any other rate, constituting one of the factors of a joint

through domestic rate shall be separately published for so much of the transportation as it represents. There is such a provision with respect to a through international rate.

The *News Syndicate* and *Lewis-Simas-Jones cases, supra*, hold that the publication of a joint through international rate is a violation of the Act because the Act requires the publication of a just and reasonable rate by United States carriers for so much of the transportation as occurs within the United States, and that the Interstate Commerce Act does not govern the joint through international rate. The publication of a joint through domestic rate is, of course, well within the provisions of the Act and its reasonableness must then, for certain purposes, be considered as a whole rather than as an aggregation of separate factors.

Obviously, there is no sensible reason for requiring the domestic portion of an international rate to be separately published if the only issue to be considered in the case of an international through rate is the reasonableness of the total charge for the entire transportation, both within and without the United States. If such is the case, the publication of the domestic, portion of the rate would be a useless requirement and proceeding; if, even though the domestic factor be unjust and unreasonable and so found by the Interstate Commerce Commission, the damage resulting from a violation of the Act is purely nominal if the total charge for the total transportation service nevertheless was just and reasonable.

Transportation in the United States and in Canada, as is well-known, occur under very different circumstances and conditions. In Canada, for instance, the base for taxation of carriers is much less than that prevailing in the United States. Much of the Canadian transportation system is owned, operated or controlled by the national government

of Canada. The presentation of evidence to show a joint through rate to be unreasonable or the Canadian portion of a through rate to be unreasonable is obviously a very different thing for a shipper or receiver of freight in the United States than is a similar showing with respect to a domestic rate. He may wish to confine his redress for an unreasonable rate to such evidence as he can obtain in this country and present it to the Interstate Commerce Commission, refraining from any attack upon the Canadian portion of the rate. And if he so chooses, he should be entitled to the redress provided by the laws of the nation where he resides and does business. The same privilege and right ought to obtain for the Canadian.

Petitioner's case, in substance, is that respondent cannot recover damages in this case unless the through charge made for the transportation of appellee's shipments from the Canadian originating points to the United States destinations was unjust and unreasonable as a total, through charge.

This contention is fully answered by respondent's argument as developed in the earlier sections of this brief.

All of the cases cited by petitioner except *News Syndicate Co., supra*, and *Lewis-Simas-Jones Co., supra*, are for transportation entirely within the boundaries of the United States and under provisions of the Act not limited in their effect specifically by the expression in section 1 of the Act, "*but only in so far as such transportation * * * takes place within the United States.*" Cases dealing with exclusively domestic rates are, therefore, not pertinent to the issue now presented to this court.

By the express terms of the Interstate Commerce Act, respondent could not complain of the through charge, nor of the Canadian portion of the rate.

Section 13, subdivision (1) of the Act provides:

"(1) That any person, firm, corporation * * * complaining of anything done or omitted to be done *by any common carrier subject to the provisions of this Act*, in contravention of the provisions thereof may apply to said Commission by petition. * * *"

Section 1, subdivisions (1a), (2) of the Act provide:

"(1) That the provisions of this Act shall apply to common carriers engaged in

(a) The transportation of * * * property wholly by railroad * * * from or to any place in the United States to or from a foreign country, *but only in so far as such transportation * * * takes place within the United States.*"

In the *Lewis-Simas-Jones Co. case, supra*, the United States Supreme Court said:

"*While the Act does not govern the joint through international* rate, the demand for reparation is grounded on the claim that the maintenance of that rate participated in by the American carrier and its violation of the Act in failing to maintain a just and reasonable rate for the transportation from the boundary to destination, operated to compel payment of the charges based on the excessive joint rate."

The *Veirs Syndicate Co.* and *Lewis-Simas-Jones Co. cases, supra*, clearly hold that it is a "violation of the Act in failing to maintain a just and reasonable rate for the transportation from the boundary to destination."

If this is true, it is equally clearly a violation of the Act, entitling respondent to apply to the Commission for a determination of its right to damages, if petitioner maintains and applies, as it did here, an unjust and unreasonable rate from boundary to United States destinations.

VI.

The conclusion reached by the Court below was right. Its judgment should be affirmed.

Minneapolis, Minnesota, November 10th, 1934.

Respectfully submitted,

ORMIE C. LANCE,

STANLEY B. HOUCK,

Attorneys for Respondent.